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Order to Show Cause

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NAVILLUS CONTRACTING,

4 Plaintiff,

5 v.

12 CV 1895 (ALC)

6 LOCAL46 METALLIC LATHERS UNION
7 and REINFORCING IRON WORKERS,

8 Defendants.

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9 New York, N.Y.

10 March 16, 2012

9:40 a.m.

11 Before:

12 HON. ANDREW L. CARTER,

13 District Judge

14 APPEARANCES

15 PAUL HASTINGS LLP (NY)

Attorneys for Plaintiff Navillus

16 BY: ZACHARY D. FASMAN

RACHEL SANTORO

17 KENNEDY JENNIK & MURRAY P.C.

18 Attorneys for Defendants Local 46

19 BY: THOMAS M. KENNEDY

SUSAN JENNIK

1 (Case called)

2 THE COURT: Please be seated.

3 MR. FASMAN: Good morning. My name is Zachary Fasman,
4 from the law firm of Paul Hastings, for the plaintiff in this
5 case. Rachel Santoro from my office is joining me as counsel.

6 THE COURT: Good morning.

7 MR. KENNEDY: Good morning, your Honor.

8 Tom Kennedy and Susan Jennik from Kennedy, Jennik &
9 Murray, attorneys for Local 46.

10 THE COURT: Okay. Good morning.

11 Okay. I've received the parties' submissions. Let me
12 just get a sense of where we are in the context of this
13 dispute. Has there been a date set for arbitration yet?

14 MR. FASMAN: There has not, your Honor. Mr. Kennedy
15 and I just talked about this last night. The Trade Board did
16 deadlock yesterday. That's where this was going. We were
17 talking about arbitrators out in the hallway right before the
18 hearing, so we don't have a date for that yet.

19 THE COURT: When do the parties anticipate they'd be
20 able to straighten that out?

21 MR. FASMAN: That all depends on whether we can agree
22 upon on arbitrator and when the arbitrator has a date but we
23 try to do that expeditiously and I am sure the union would do
24 it expeditiously too.

25 THE COURT: Thank you.

1 MR. KENNEDY: Your Honor, I wanted to note that
2 there's actually a written decision from the Trade Board that
3 we regard as material to the outcome of this injunction
4 proceeding this morning. I'd like to hand it up.

5 THE COURT: That's fine. I assume counsel for the
6 plaintiff has a copy of that as well.

7 MR. FASMAN: I have several and I was going to do the
8 same thing as well.

9 THE COURT: Okay. Have a seat. I need a moment to
10 review this.

11 (Pause)

12 THE COURT: Okay. Thank you. All right. Let me find
13 out from the parties just to confirm a few things. So the
14 status of the work that is going on at the World Trade Center
15 cite, is not going on at the World Trade Center site is from my
16 understanding, Local 46 is installing currently rebar that's
17 being delivered to the actual site of the World Trade Center
18 but Local 46 is not participating in the shaping of the rebar
19 off site; is that correct?

20 MR. FASMAN: I think that's essentially correct, your
21 Honor. What is happening right now is that for the past
22 several weeks we have been able to continue working on the job
23 with straight rebar, in other words, the stuff that isn't bent
24 and we have been building the facility with straight rebar.
25 Our ability to continue to function that way is going to go

1 away. We're installing, essentially, all we can install is the
2 straight stuff.

3 The bent material to the extent that it was prior
4 bending, that stuff has either been installed or is available
5 to be installed. We also have a truckload of rebar that was
6 bent in New Jersey that's been sitting on the site and that
7 hasn't been done. So that is the status of the dispute is that
8 we have essentially not bent for some period of time and we are
9 going to run out of, at some point you've got to stop with the
10 straight stuff and you've got to install the bent rebar. So
11 that's about where we are.

12 The work -- we did technically misstate that all the
13 work has stopped. It hasn't. We have been fortunate that we
14 have had straight rebar that hasn't been bent.

15 THE COURT: Okay. Thank you.

16 MR. KENNEDY: That's -- I appreciate the admission by
17 counsel. It would be a very different case had all the work
18 stopped at the site. The Local 46 represented employees on the
19 site are performing all of the work they've been asked to do
20 and they are ready, willing and able to bend rebar on the site.
21 The Trade Board decision, as your Honor just undoubtedly
22 observed at page three, reads quote, the board unanimously
23 agreed -- this is yesterday -- that the installation of rebar
24 bent on-site should proceed uninterpreted. Local 46 is in
25 support of that. Bending at the site occurred beginning in

1 January and occurred through the end of February. There's no
2 reason why it can't resume. The employer may have an interest
3 in doing this elsewhere and we can arbitrate whether it wants
4 to but there's no pressing need to enjoin Local 46 because we
5 can go back to the status quo -- which is the material was
6 being bent on the site.

7 THE COURT: Let me hear from plaintiff counsel as to
8 why it's plaintiff's position that the material should not be
9 bent on-site. I understand that there's some safety concerns
10 that you laid out regarding carbon monoxide and space. I guess
11 the space issue, my understanding, and correct me if I am
12 wrong, is that the space -- well, let me not say that. Let me
13 find out from you what's the space issue here.

14 MR. FASMAN: Well, your Honor, if you look at
15 Mr. Smith's affidavit and the photos that are on Mr. Smith's
16 affidavit, you'll see it. This is a very tight construction
17 site right now. There are a number of contractors on the site.
18 There's rebar lying all over the place. There are machines all
19 over the place. These contractors are in essence one on top of
20 the other and it's been our position and continues to be our
21 position that the machine that's there with the carbon monoxide
22 problems with the -- I don't want to say this in the wrong way
23 and confess to an OSHA violation -- but the shielding is not,
24 perhaps, what we would want it to be and we're concerned that
25 there are some real safety issues there with regard to

1 continuing to bend on-site.

2 And I think it's somewhat disingenuous of Mr. Kennedy
3 to say, well, we go back to the status quo. The status quo was
4 we assigned people from Local 46 to come out to our facility,
5 as we're entitled to do under the contract, and work and handle
6 this and bend it in Sayreville and deliver it to the site.
7 That would have been the status quo but for the fact that the
8 union said, well, you are not going to Sayreville and we are
9 not going to install anything on-site

10 THE COURT: OK. And my understanding is that the
11 robotic equipment that is used to bend the rebar in Sayreville
12 is different than the equipment that's on-site and that the
13 equipment in Sayreville would use two workers as opposed to
14 three; is that correct?

15 MR. FASMAN: Well, we've assigned two to it and that's
16 exactly right but we would be, if the union would supply men to
17 work there, we'll be happy to put three on until the
18 Arbitration Board meets -- until the arbitration is resolved.
19 We're not interested in going away from that and it's a
20 different type of machinery but it's much, much safer. It's
21 much cleaner. It's in a big not in enclosed space. It doesn't
22 operate. And I am going to say something that I don't know
23 enough about but it's not gasoline engines operating within an
24 enclosed facility. This particular vehicle site as it goes up
25 is going to be a large garage where buses will park and you are

1 going to have to do this in increasingly enclosed spaces and we
2 have been concerned about it. And there are several other
3 contractors who because of those same concerns are bending
4 off-site.

5 THE COURT: Thank you. Why don't we do this. Let's
6 just step in the robing room and have some conversations.

7 MR. FASMAN: Certainly, your Honor.

8 (Recess)

9 THE COURT: Okay. I have had off the record
10 conversations with each side separately to see if there's a way
11 we can resolve this matter. It doesn't appear that there is
12 without dealing with the issue of the requests for the
13 temporary restraining order and preliminary injunction. Let me
14 ask a few more questions of the parties.

15 Let me find out plaintiff's position on why plaintiff
16 believes it's allowed to have the bending of the rebar take
17 place off-site. Tell me the Collective Bargaining Agreement.

18 MR. FASMAN: I think the Collective Bargaining
19 Agreement does say that rebar shall be bent on-site. On the
20 other hand, if there were a safety concern the parties could,
21 certainly, agree that it be bent off-site, that it's being done
22 at other sites in the World Trade Center. One of the things
23 about Labor Law is that there is a law of the shop where
24 there's a problem and this is what we would argue to the
25 arbitrator. If there was a problem past practice and how the

1 parties operate would definitely be involved.

2 But I want to make clear, your Honor, that the notion
3 that the Collective Bargaining Agreement says there should be
4 no bending off-site period is really asking your Honor to rule
5 on the merits of the dispute -- We think that that language is
6 susceptible exceptions for safety concerns and things along
7 those lines. The union, a dozen or at least a dozen in this
8 case, we have our arguments about this. They have their
9 arguments about this. And what we're in essence saying is that
10 the Collective Bargaining Agreement says this. That's all it
11 says and that's the end of this case. I don't think that's
12 true. And I think that we have the right to argue to an
13 arbitrator that there have been exceptions. There's a real
14 safety concern here and that this is one of those situations
15 that this should be bent off-site despite the language of the
16 contract.

17 THE COURT: One of the things that I need to decide is
18 whether or not this job action or inaction on the part of the
19 defendants violates a no-strike clause or similar clause in the
20 Collective Bargaining Agreement. And it appears that
21 essentially defendants' argument is, I guess, they haven't
22 quite phrased it this way, is that by taking this inaction they
23 are not violating a no-strike clause in the Collective
24 Bargaining Agreement but they are, essentially, trying to keep
25 plaintiff from violating the Collective Bargaining Agreement.

1 MR. FASMAN: Well, your Honor, as the employer we have
2 the right to make work assignments and to the extend that they
3 are not followed that's a strike in violation of the contract.
4 As to whether they can -- the problem is even the way you
5 phrased it, your Honor, is they're taking matters into their
6 other own hands. They're saying, look, this contract says
7 there should be no off-site bending, no exception. We don't
8 agree with that. There's off site bending going on at the
9 World Trade Center site right now. There is no question that
10 that's the case. Other contractors are doing this. And for
11 them to say, well, this contract has never allowed off-site
12 bending. That's not true.

13 But more to the point it's not an excuse when we say
14 we have the right to assign the men. We want your men to go to
15 New Jersey, bend off-site, they say you don't have that right.
16 That's what's being arbitrated. And they don't get the right
17 to say oh, well, wait a second. We don't agree that you have
18 that right and we are not going to go to New Jersey. We're not
19 going to allow our men to go there pursuant to your work order
20 and we're not going to install anything that you bend off-site.
21 In essence, whether or not they have the right to do that or
22 not, whether or not we have the right to assign them or not is
23 what goes to the arbitration. So it's really an argument that
24 you prejudge the arbitration and decide what the arbitrator
25 will decide. Whether we're right or wrong in making these work

1 assignments will be arbitrated.

2 THE COURT: I am certainly not here to decide that
3 ultimate issue but I have to consider whether or not this
4 action violates that no-strike clause in the Collective
5 Bargaining Agreement and then once we get through those Boyce
6 Market factors I have to get to the ultimate factors of an
7 injunction or a temporary restraining order generally in terms
8 of irreparable harm and likelihood of success on the merits. I
9 still have to look at those issues.

10 So your position is that -- I guess, what about the
11 notion that the parties have entered into this Collective
12 Bargaining Agreement and that Collective Bargaining Agreement,
13 certainly, the Boyce Market seems to suggest strongly, if not
14 out right say, that the parties should be held to that
15 Collective Bargaining Agreement, the whole reason, rationale
16 behind Boyce Market was, okay, you can enjoin, a court can
17 enjoin a labor union from striking because that labor union
18 collectively bargained and had this no-strike clause in there
19 so they should be held to that bargain in spite of the other
20 legislation that was passed by Congress. Why wouldn't the
21 opposite apply here that the parties have collectively
22 bargained this? And if the parties wanted to put in exceptions
23 that, certainly, could have been done in the Collective
24 Bargaining Agreement.

25 MR. FASMAN: Well, no question that's true, your

1 Honor. But remember that's the issue that's going to be
2 arbitrated. That's the issue that the Trade Board deadlocked
3 on. I mean, the Trade Board basically said, well, you know as
4 to off-site bending we, you know, it was two to two, this
5 should be resolved in arbitration. We think we have the right
6 to make these arbitrations off-site. The union doesn't.
7 That's the horse race. That's where we're going with
8 arbitration but the union doesn't have the right. There are
9 two no-strike clauses, not just one.

10 There is one on page 11 where I says, the union shall
11 note order a strike or stoppage of work, nor shall they
12 collectively leave the work of the employer pending the
13 adjustment of these disputes. On page 13 under the Trade Board
14 section the contract says, it is mutually agreed that there
15 should be no cessation of any work in connection in which there
16 may be a complaint or charge but that all such work shall
17 regularly proceed pending the decision of the Trade Board or
18 executive, blah, blah, blah.

19 That's very clear. They stopped doing the work. They
20 have work walked off. The union has ordered our employees,
21 members of the union, not to work in Sayreville and not to go
22 back to Sayreville. And we've got one truckload of rebar
23 sitting on the ground which we can't install and this is going
24 to go on like this pending the arbitration of this issue.

25 THE COURT: In terms of the way that you are

1 encapsulating this issue if this situation were different or
2 let's say it is the same factual scenario that we find
3 ourselves in and if defendant came to court first as the
4 petitioner and petitioned and said that the current plaintiff,
5 that you should not be allowed to bend work off-site because of
6 this Collective Bargaining Agreement that they'd be totally
7 entitled to request that preliminary injunction, that temporary
8 restraining order and that I should issue that.

9 MR. FASMAN: No, because they don't have that right.
10 They would get that right. The reason we're here is because of
11 the work stoppage. That's what brings us here. The reverse
12 Boyce Market doesn't work the same way. If they think that we
13 should not bend off-site they have the opportunity to go
14 through the grievance and arbitration procedure and to proceed
15 in that exact way. There are very few reverse Boyce Markets
16 against employers and for that same reason.

17 Plus, in this situation, judge, there is no
18 irreparable harm. We have to do this project. We have to
19 install this stuff. The World Trade Center site has to go on.
20 This is the first building. Every truck is going to have to
21 pass through this building. My friends at the table behind me,
22 we're willing to pay everyone. We're willing to employ them in
23 a completely different, in a completely different environment
24 that's much safer. We're willing to pay them wages. I mean
25 this is no harm/no foul to them.

1 THE COURT: OK. So let me hear more from you as to
2 the irreparable harm to you.

3 MR. FASMAN: Well, your Honor, we have as to
4 irreparable harm as I believe I indicated, we have eight
5 thousand tons of rebar to install, five thousand tons of which
6 have to be bent. The union says, well, we've bent 46 tons. It
7 isn't going to get us very far in this situation. We have a
8 contract that has very tight deadlines in it. The entire
9 project as I understand it is already five months behind
10 schedule and we have a contract that's also subject to
11 acceleration. This is really the first building. This one has
12 to be built to let other trucks and other buses get in. So we
13 have penalty clauses and we need to install this stuff and we
14 need to install it now and we need to do it in a most
15 expeditious way possible with minimal safety risks to the
16 employees.

17 It is not like we're asking the employees it to go
18 over to Sayreville and bend it by hand. We're asking them to
19 come operate machinery that is much safer than what they're
20 operating right now and to help us. It's their work. We have
21 no question. It's their work. They are entitled to bend the
22 rebar. We have no problem with this. But we think the union's
23 unilateral decision to say, you are not going to Sayreville.
24 We are not operating this off-site. It is clearly a strike in
25 violation of the contract and it puts us really behind the

1 eight ball in terms of completing the project and doing this in
2 a proper way, to say nothing of the safety concerns.

3 THE COURT: You indicated that the project is about
4 five months behind schedule and I gather that, if anything, you
5 might be able to attribute three days of that to this situation
6 of that delay.

7 MR. FASMAN: I meant to say and I hope I didn't
8 misstate. I think it's the whole project, the whole WTC site.
9 There are many, many different things being built there. So,
10 as usual in a project of this size it's way behind schedule.
11 And we're under pressure because of that. I am not talking
12 about three days or whatever is going on between the parties
13 here. It's not, certainly, attributable to that, the five
14 months behind. There are tons and tons of projects going on.
15 But at the same time, as you said, we have acceleration clauses
16 in the project and this is the keystone building. You've got
17 to go through this in order to get to the other side. So we
18 have to stick here. We also have liquidated damages clauses,
19 penalty clauses throughout our contract.

20 THE COURT: You indicated that in terms of the
21 installation of the straight steel bars that's almost completed
22 and again both sides have indicated that there is a truck with
23 rebar that was bent in New Jersey that's on-site and
24 defendant's have indicated in their submissions that they're
25 willing to bend that on the site. How long would that take for

1 that action to take place?

2 MR. FASMAN: I don't think they would bend it on-site.

3 THE COURT: Not bend but to install it on-site?

4 MR. FASMAN: I don't know. Not very long. I mean the
5 one truckload isn't going to get us very far. The problem is I
6 don't know how many tons are in there but it's a minimal
7 amount. We'd be out of work by the middle of next week even if
8 we installed that one truck at the latest, the end of next
9 week. And we have got to proceed on this job. That's really
10 why we're here. We need to get going on this. And as I say,
11 if we're wrong and the arbitrator finds that we're wrong and
12 finds that the work should have been on-site, the arbitrator is
13 able to issue whatever remedy that the arbitrator can issue.
14 And if we have to do it the other way we'll do it the other way
15 but we think we can do it off-site. We think that's consistent
16 with the contract and, certainly, half of the Trade Board
17 thought that we were right on that. And I think we're able to
18 go forward with that.

19 THE COURT: I understand the parties haven't picked an
20 arbitrator yet but it doesn't appear that this arbitration
21 process once it starts would take very long. Do you agree with
22 that?

23 MR. FASMAN: We will be happy to do it as quickly as
24 possible. This may be a one day hearing. We've got a few
25 witnesses about these issues, safety directors, folks like

1 that. I have no idea what the union would bring forward in
2 terms of their proof but it doesn't sound like more than a day
3 or a day and a half hearing. Of course, arbitrators you can
4 request that they issue a prompt decision. You can't always
5 demand it.

6 THE COURT: All right. Thank you. I want to hear
7 from defense counsel as to the plaintiff's claim of irreparable
8 harm.

9 MR. KENNEDY: We thought it was telling that 98
10 percent of the response on irreparable harm was economic. That
11 there's five thousand tons to install. They've only done 46
12 on-site but there's 15 tons, I am told, on the truck. But in
13 order to get this project back on time they've got to bend it
14 on off-site.

15 There was hardly a word about safety in that whole
16 presentation. There is no irreparable harm in connection with
17 safety. Regardless this is the same site it's like every other
18 site in the City of New York, nothing special or unique about
19 it. The union, in our view, would be irreparably harmed by
20 having its contract violated. Even if our men are sent to New
21 Jersey and paid it is still against the square language of the
22 contract and it is true that the parties have a disagreement
23 about that. And essentially the disagreement being whether
24 that bold language has an exception for safety and if it does
25 they can prove some safety related issues.

1 Now, they'll have an opportunity to do that in front
2 of an arbitrator. We will proceed to that very quickly. If
3 they win, they win. But the issue today is, are they entitled
4 to an injunction which would require the union to do something
5 against its contract in the interim between today's hearing and
6 when that arbitration was concluded and we suggest to you there
7 is no basis for doing that. They haven't demonstrated a
8 likelihood of success. I've certainly seen arbitrations where
9 people take usually for economic reasons somewhat strange
10 interpretations of the contract. I don't think it's a million
11 to one shot that they can win this. There is, certainly, no
12 likelihood of success here and the clarity of the contract
13 which says that all rebar will be cut and bent on-site.

14 The Collective Bargaining Agreement does have two
15 references to not striking and I think that's the significance
16 because the second one on page 13 provides that any limit or
17 cessation of work is only until there is a Trade Board
18 decision. There is a Trade Board decision in this case. It's
19 true they deadlocked on the question of whether work should be
20 bent off-site but they agreed that the work should proceed and
21 be bent on-site. So there's a remedy in effect that's already
22 been given us by the Trade Board that while the question of
23 off-site work is being arbitrated in that interim, the union is
24 directed and required and wants to bend and cut we rebar is
25 necessary on the site.

1 It's important I think for us to realize who is not
2 here today. The actual contractor, as was seen in the papers,
3 is PMC. PMC is the group to which Navillus subcontracted the
4 job of cutting bending and installing rebar at the site. Are
5 not here today. They haven't taken the position that it's
6 unsafe to perform the work that they agreed to do on the site.
7 The owner has not submitted anything. The Port Authority is
8 suggesting there's something unsafe about the building
9 operations. The manager to the site, Tishman, has not
10 presented anything suggesting it's unsafe. And, in fact, our
11 understanding of each of those entities is that they do regard
12 it as safe and this an economically safe application by the
13 plaintiffs.

14 For this to be granted would authorize an employer to
15 get around that by simply seeking an injunction with the
16 argument that the union hasn't agreed to violate its contract
17 as your Honor phrased it and, therefore, they should be
18 required to violate their contract until the employer's claim
19 is arbitrated. It simply doesn't work that way.

20 The standards under Boyce Market are specific and
21 clear. The employer has, I don't think, made a showing that
22 meets any of them and we would ask that the injunction be
23 denied.

24 The original application was -- had to be, we think,
25 supported very substantially, that there was a safety issue.

1 It wasn't. No showing of anything unsafe. No showing that
2 anyone was injured. No showing that there were chains. No
3 showing of any OSHA violations. No showing of any actual,
4 concrete, specific safety violations on-site. And in the
5 absence of that we would submit that they have simply failed to
6 support the issuance of an injunction. On top of that we do
7 have now as I've said -- and I apologize for repeating
8 myself -- the decision by the Trade Board that "The board
9 unanimously agreed that the installation of rebar bent on-site
10 should proceed uninterrupted." That's what we wanted. That's
11 what we got. We think that makes an injunction inappropriate.

12 THE COURT: Thank you. Let me hear from the plaintiff
13 on anything.

14 MR. FASMAN: Well, your Honor, we have Mr. Smith here
15 and can talk about what we know from Tishman, what position
16 they've taken, what the Port Authority would say. And these
17 are -- we haven't put this in our papers because, obviously,
18 that's the merits of the case. But I mean we have serious
19 safety concerns. The Port Authority shares those concerns.
20 Tishman shares those concerns. That's what we are going to
21 present in the arbitration but if your Honor wants to hear
22 them, Mr. Smith is more than willing to get on the witness
23 stand and talk about the safety concerns, where this safety
24 report that's attached to his affidavit came from. The union
25 says that's sham. It was created on March 12. It goes back a

1 long, long way. We have been worried about this the whole
2 time. There are serious safety concerns here and we have
3 talked about this with Tishman, with the Port Authority, with
4 TMC. They all agreed that there are safety concerns here and
5 we are willing to present testimony to that effect if your
6 Honor wishes.

7 As to likelihood of success on the merits, it's
8 likelihood of success showing there's on the Boyce Markets that
9 there is an arbitral agreement that it should be submitted to
10 arbitration and that there is irreparable harm. I mean, what
11 Mr. Kennedy is saying is, judge, we want you to prejudge the
12 merits and by the way we don't think their case on merits is
13 very good. That's not the job of a court faced with a Boyce
14 Markets injunction. That's asking the Court to say, well, I
15 don't agree. I don't think this is much of a grievance,
16 therefore, the injunction is denied. That's -- the whole game
17 is this should go on to an arbitrator. There is no no-strike
18 clause. The union's admitted that they pulled the men off the
19 job in Sayreville. The union's admitted that they told their
20 men that you are not to install rebar that's been off-site.
21 That's enough on the Boyce Market. What Mr. Kennedy wants you
22 to do is to say, I don't agree with their interpretation of the
23 contract but that's why we're going to arbitration and that's
24 something that is not part of a normal Boyce Market inquiry.

25 THE COURT: Okay. So can you tell me a little bit

1 more in terms of the irreparable harm. Can you spell out for
2 me in terms of these timelines under the contract and how
3 exactly these timelines will be affected in the short term
4 because I understand both parties have, certainly, an interest
5 it dealing with this as expeditiously as possible.

6 MR. FASMAN: Your Honor, if I might, I'd ask Mr. Smith
7 to do that. He knows better than I do. He is the general
8 foreman on our site. They are dealing with the whole site and
9 he can present chapter and verse on that. I don't know that I
10 could go into it as well as he can.

11 THE COURT: Okay. That's fine. Let's go ahead and
12 swear him and have him testify.

13 KEVIN SMITH,

14 called as a witness by the Plaintiff,

15 having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. FASMAN:

18 Q. Mr. Smith, by whom are you employed, sir?

19 A. Navillus Contracting.

20 Q. What is your job?

21 A. My job title is Project Manager for the World Trade Center
22 Vehicle Security Center.

23 Q. What's entailed in that job, sir?

24 A. I am in charge of managing the project financially,
25 schedule manpower material.

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Smith - Direct

1 MR. FASMAN: Your Honor, may I show the witness his
2 affidavit and enter that into --

3 THE COURT: Yes.

4 (Pause)

5 THE COURT: Defense counsel has a copy of that, right?

6 MR. KENNEDY: I do, your Honor.

7 MR. FASMAN: Trying to make sure I have a copy as
8 well, your Honor.

9 BY MR. FASMAN:

10 Q. Mr. Smith, do you recognize this document?

11 A. I do.

12 Q. Is your suggest on that document, sir?

13 A. It is.

14 Q. Is this true and accurate to the best of your knowledge,
15 sir?

16 A. Yes.

17 Q. Let me ask you just a few questions to respond to the
18 judge's inquiries as to the time deadlines, the nature of the
19 contract that Navillus has for this and the need for speed.
20 First of all, tell us what -- there is a contract that Navillus
21 holds for this building, correct?

22 A. There is.

23 Q. And with whom is that contract?

24 A. We have a contract with the Port Authority of New York and
25 New Jersey.

C3GAANAVO

Smith - Direct

1 Q. And does that contract contain timetables?

2 A. It does.

3 Q. Tell us what those timetables are if you can?

4 A. The timetables require us to finish phase, turnover
5 phrased, completion of the project. Those timelines are, I
6 believe, the fourth quarter of 2012 for a time completion and
7 beginning of the third quarter of 2012 for the beginning of
8 phase one which is about the first 60 percent of the project.

9 Q. Okay. And where are you now in terms of the work being
10 perform, on time, behind?

11 A. Approximately, five months behind that timeline.

12 Q. Okay. And why is that, sir?

13 A. It has to do with getting the project started factors that
14 are outside of Navillus' control for the most part.

15 Q. Is the contract subject to acceleration?

16 A. It is.

17 Q. What does that mean?

18 A. That means that we will be forced to complete the project
19 on time or as close to on time. What will be required to do is
20 dramatically increase our manpower work, a lot of overtime to
21 bring the project in as close to the timeline as possible.

22 Q. Are there any contractual penalties if you don't do that?

23 A. There are.

24 Q. Tell us what those are, sir?

25 A. I'm not sure of the exact quantity of amount of liquidated

C3GAANAVO

Smith - Direct

1 damages but the liquidated damages are actually stated to begin
2 at the contractual date and it's the phase turnover to us by
3 the steel contractor, it says the overall timeline is the
4 requirement for the liquidated damages. It doesn't matter when
5 we turn the steel over to us. When they turn the structure
6 over to us the controlling thing is when we complete it, so the
7 way the contract is written it doesn't matter if they delayed
8 us, we still have to complete at the date.

9 Q. Did they, in fact, delay you?

10 A. They have.

11 Q. Okay. All right. Can you tell us what the building
12 configuration is that you are building? What is the vehicle
13 center, vehicle security center going to look like when it's
14 done?

15 A. It's going to be essentially an armored parking garage.
16 Buses and trucks will come in on one end down a ramp. They
17 will also be put through a screening process where they'll be
18 x-rayed and checked for security. They will then proceed down
19 to another level where there will be parking and also tunnels
20 that bring them out the entire World Trade Center complex.

21 Q. Is this all below ground structure?

22 A. For the most part 90 percent of the structure is below
23 ground.

24 Q. Okay. Let me direct your attention to the Paragraph Eight,
25 I believe, of your affidavit which talks about a safety survey.

C3GAANAVO

Smith - Direct

1 Why don't you take a moment and read that, sir.

2 (Pause)

3 Q. Have you read that, sir?

4 A. I have.

5 Q. Did you have any role in preparing this survey?

6 A. I did.

7 Q. What's your role, sir?

8 A. I participated with your Safety Director Patrick Mills in
9 preparing this.

10 Q. To the best of your knowledge, when did you or the safety
11 director begin preparing that survey?

12 A. We have been looking into safety issues related to rebar
13 bending since we started on-site in January.

14 Q. What prompted you to do that?

15 A. We are continually focused on safety. We have safety
16 audits, our own personal every week. We do it, our foremen do
17 a daily check list of their spaces. That's a major focus of
18 ours.

19 Q. And was there anything specific that prompted this when the
20 job began, any specific concerns about safety?

21 A. The job's somewhat unique and that there is very little
22 space. In fact, at this moment we have no way to lower rebar
23 into the site except through some very minor holes in the deck.
24 The logistics of the site are very difficult, very challenging
25 and there is very, very little room to work. Normally on a job

1 like this you'd have an awful lot more space and an awful lot
2 more access to the job.

3 Q. Is that because most jobs are above ground?

4 A. That is part of it. The only other thing is just the
5 configuration of the job with the World Trade Center, the 9/11
6 memorial's immediately adjacent to us, so we have immediate
7 safety concerns. Residential buildings in the areas. Just the
8 configuration of traffic in and out of the site is very
9 challenging.

10 Q. Are you familiar with the safety report that is Exhibit B
11 to your affidavit, sir?

12 A. Yes.

13 Q. And did you have any role in preparing it?

14 A. Yes, I did.

15 Q. And when, to the best of your knowledge, when was this
16 prepared?

17 A. Within the last week.

18 Q. Why was it prepared within the last week?

19 A. This was prepared in support of our case here.

20 Q. Are there any other documents dealing with safety issues
21 from this site?

22 A. We would have safety reports, foremen's daily reports. We
23 have a whole range of documents related to safety.

24 Q. Now, with regard to the safety concerns that are outlined
25 in this report in Exhibit B, the union has said that that's a

C3GAANAVO

Smith - Direct

1 sham designed to cover-up an economic motive to have this done
2 elsewhere. In your view is that true or not true?

3 A. It's not true.

4 Q. Why do you say that, sir?

5 A. Because there is a genuine safety concern. The concern is
6 not just in the bending of rebar. It's the material handling.
7 Every time you pick something up you have an inherent risk in
8 doing that. By bending on-site you at least double the amount
9 of picks and carries that you have to deal with in this
10 material. So it's definitely a safety concern.

11 Q. When with you say "picks and carries" what do you mean by
12 that?

13 A. We get rebar into site and, approximately, five thousand
14 pounds bundles. Those have been to be moved through the site
15 to the bending area. We never are able -- we will not be able
16 to maintain a steady bending area so we won't be able to
17 establish good logistics links there. So we'll have machinery
18 tracking back and forth, fork lifts, trains, moving this
19 material from one location on-site to another to another
20 sometimes through multiple levels where it has to get dropped
21 through a hole in the deck to the next level, then picked and
22 carried to the bending place, then from there moved to the pick
23 hole again lifted, carried across and brought back to the
24 installation place.

25 Q. What, if any, advantages in this process would there be to

C3GAANAVO

Smith - Direct

1 having the rebar bent off-site in New Jersey?

2 A. The material would have only have to be moved from the
3 truck to the installation site rather than being moved from the
4 truck to the bending yard, then to the installation sites. So
5 you have the amount of moves on the site.

6 Q. We have been, during our argument we talked about the one
7 truck that has bent rebar on it on-site. Do you know how many
8 tons are in that?

9 A. I believe the total truck I believe 20 something tons, 22
10 tons. The bent material I believe was, approximately, 15 tons.

11 Q. How many tons, just for the record under oath, how many
12 tons of rebar will have to be installed in the VIC?

13 A. Approximately a thousand.

14 Q. How many tons of that will have to be bent?

15 A. Approximately, five thousand. Excuse me. Approximately,
16 60 percent.

17 Q. There was some notion of other entities involved with the
18 site not having safety concerns Tishman and Port Authority of
19 New York?

20 A. Tishman is the construction manager.

21 Q. And do you have feelings with them?

22 A. Yes. Tishman manages us for the Port Authority.

23 Q. Have you discussed safety concerns?

24 MR. KENNEDY: Objection, your Honor. This would be
25 plain hearsay. The point I had made earlier is if the petition

C3GAANAVO

Smith - Direct

1 is supported by evidence from these entities demonstrating any
2 safety concerns they have, that was --

3 THE COURT: Objection sustained. Rephrase the
4 question.

5 MR. FASMAN: Yes, I will, your Honor.

6 BY MR. FASMAN:

7 Q. Do you know, if without telling us, do you know if any
8 other entities involved in World Trade Center site on this
9 project have safety concerns about this particular process?

10 MR. KENNEDY: Objection.

11 THE COURT: Sustained.

12 BY MR. FASMAN:

13 Q. Have you ever -- let's strike that.

14 Can you tell us what the impact has been of the
15 union's refusal to continue to allow its members to bend it at
16 Sayreville? Has that had an impact on Navillus' business?

17 A. Yes.

18 Q. Can you tell us what was it is?

19 A. We've been unable to proceed with certain areas of the
20 project, primarily, a slab at television 253.

21 Q. And what impact would it have if all the bending had to be
22 done on-site, that is if you couldn't go to Sayreville?

23 A. I believe we would need probably bending operations
24 on-site. It would be an awful lot of additional bar required
25 on-site to warehouse this while the bending was being done.

C3GAANAVO

Smith - Direct

1 This would take up an awful lot of space and it would be very
2 slow.

3 Q. Do you know if other contractors at the World Trade Center
4 site have been bending off-site?

5 A. I do.

6 Q. How do you know that, sir?

7 A. From talking to them.

8 MR. KENNEDY: Objection, your Honor.

9 THE COURT: Objection sustained.

10 BY MR. FASMAN:

11 Q. Aside from talking to them do you know that this is
12 happening?

13 A. I've seen trucks with bent rebar delivered to the site.

14 Q. And without asking about your discussions with other
15 people, have there been discussions --

16 A. Yes.

17 Q. -- with Tishman and the Port Authority about safety?

18 A. Yes.

19 MR. FASMAN: All right I am not going to ask you what
20 those discussions were. I'll tender the witness, your Honor.

21 THE COURT: Okay. Cross-examination?

22 CROSS-EXAMINATION

23 BY MR. KENNEDY:

24 Q. Mr. Smith, my name is Tom Kennedy. I am an attorney for
25 the union.

C3GAANAVO

Smith - Cross

1 You have been with Navillus since 2008; is that
2 correct?

3 A. 2009.

4 Q. 2009. You've a project manager since that time?

5 A. I have.

6 Q. When was Navillus awarded the super structure of concrete
7 contract for the vehicle safety center?

8 A. I believe it was July of this year of last year. Excuse
9 me.

10 Q. July of 2011?

11 A. That's correct.

12 Q. And that contract is valued at 76.5 million?

13 A. Yes.

14 Q. Was that the amount that Navillus bid for the right to
15 perform this work?

16 A. Yes.

17 Q. In structuring that bid did Navillus assume that Local 46
18 would represent the workers who performed the cutting, bending
19 and installation of steel rebar?

20 A. Yes.

21 Q. And isn't it a fact that at the time of the submission of
22 the bid for this work Navillus assumed that cutting and bending
23 of rebar would be done on-site?

24 MR. FASMAN: Your Honor, I have no object. There is
25 no evidence that this witness would know that.

1 THE COURT: That's overruled. You can answer.

2 A. I am not the estimator. That's not my job.

3 Q. You don't know. It's my understanding that Navillus,
4 actually, subcontracted the work of installing, cutting and
5 bending steel rebar to PMC Rebar; is that correct?

6 A. That's correct.

7 Q. And when was that done?

8 A. January 2012. I am not certain of that date.

9 Q. All right. That's your best estimate at this point? Do
10 you know how much that contract is worth?

11 A. It's a per pound contract since we don't know the exact
12 quantity of rebar but it's, approximately, \$12 million.

13 Q. Okay. And the 12 million assumed that Local 46 would be
14 representing the folks that did the work?

15 A. Correct.

16 Q. And PMC Rebar after getting the contract installed a
17 cutting and bending machine at the work site, correct?

18 A. They had brought a cutting and bending machine to the site,
19 yes.

20 Q. And from, approximately, January 23, through the end of
21 February PMC Rebar performed cutting and bending work with
22 Local 46 labor at the site; isn't that also correct?

23 A. That's correct.

24 Q. Now, it's my understanding that Navillus has notified PMC
25 that they're taking part of the work away from them; is that

1 also correct?

2 A. That's incorrect.

3 Q. All right. The scope of the work that PMC Rebar was given
4 was the right to cut, bend and install all of the rebar for the
5 project, correct?

6 A. It's the installation of the rebar and associated work.

7 Q. The associated work includes all the cutting and bending?

8 A. That is correct, yes.

9 Q. So if Navillus is performing the work of cutting and
10 bending in its Sayreville facility, would that be work that was
11 taken from PMC?

12 A. That contractual, those contractual details are still under
13 negotiations.

14 Q. So you at least notified PMC that Navillus wanted to
15 renegotiate the agreement and conduct its own cutting and
16 bending, correct?

17 A. We are in discussions about exactly that, not taking the
18 work from them, perhaps, having their people do this work.

19 Q. When did you notify PMC Rebar that you wanted to have this
20 work done off-site in Sayreville?

21 A. They have been aware of it for nearly the entirety of the
22 discussions of the contract.

23 Q. And so give me a time. When would that apply?

24 A. December/January.

25 Q. So is it fair to say then that as of December 2011 going

C3GAANAVO

Smith - Cross

1 forward, Navillus was considering having the cutting and
2 bending work done off-site at its Sayreville facility?

3 A. Certainly, considering, yes.

4 Q. Isn't it a fact that it wasn't until February 29, 2012 that
5 Navillus notified Local 46 that it was going to be performing
6 cutting and bending work off-site?

7 A. Yes.

8 Q. So that these discussions were going on for three months
9 before you notified the union?

10 A. Yes.

11 Q. And in December of 2011 the job site hadn't started yet,
12 correct? At least the steel work hadn't started on the job
13 yet?

14 A. That's right.

15 Q. So would it be fair to say that as of December 2011 there
16 were no safety concerns at the project since it hadn't started
17 yet?

18 A. We were aware of the logistical situation of the site at
19 that time and aware that there could possibly be safety issues.

20 Q. Could possibly be safety issues. Well, I assume that you
21 were aware of the logistical circumstance of the site at the
22 time you made the bid sometime in early 2011; isn't that also
23 true?

24 A. No.

25 Q. What is it that happened as of December 2011 that caused

C3GAANAVO

Smith - Cross

1 you to be concerned about the safety of cutting and bending on
2 the site?

3 A. The project had started and we could see the way the
4 project was developing. As we were bidding a job and early on
5 we did not see that. Once you, actually, see it taking shape
6 then you have a real handle on what's going on.

7 Q. Has PMC refused to do the cutting or bending work that it
8 contracted to do at the BSC site?

9 A. No.

10 Q. They're still prepared and willing to go forward cutting
11 and bending the work on the BSC site, isn't that correct?

12 A. I haven't had specific discussions with them about that.

13 Q. Had they said anything that makes you believe that they're
14 not interested in fulfilling the contract they got in January?

15 A. No.

16 Q. When did Navillus purchase the cutting and bending machines
17 that it installed in Sayreville?

18 A. January.

19 Q. Of?

20 A. 2012.

21 Q. Okay. And is the Sayreville site one that's owned by
22 Navillus?

23 A. No, it is not.

24 Q. It's a rental site?

25 A. It is.

C3GAANAVO

Smith - Cross

1 Q. How long a lease does Navillus have for the Sayreville
2 site?

3 A. Two years.

4 Q. When did the cutting and bending machines that you've
5 installed in Sayreville become operable?

6 A. Late February.

7 Q. Is it fair to say that as soon as the machines became
8 operable Navillus directed 46 employees to perform the cutting
9 and bending work in Sayreville?

10 A. Yes.

11 Q. Why was the union not notified of your intent to perform
12 BSC cutting and bending off-site work until the machines were
13 already installed and ready to operate?

14 A. Didn't think it was necessary.

15 Q. You didn't think it was necessary. Okay. I'd like to
16 direct your attention to your statement, particularly,
17 Paragraph Eight.

18 A. Sure.

19 Q. I believe counsel previously directed your attention to
20 that matter. Now am I accurate in saying that Paragraph Eight
21 of your statement which has been put in the record is the part
22 of your statement where you identify the safety concerns that
23 Navillus is using as the reason for this decision to cut and
24 bend off-site?

25 A. It's one of the paragraphs with the safety concerns I

1 listed.

2 Q. Well, are there -- well, let's look at -- would it be fair
3 to say that Paragraphs Eight and nine are where the concerns
4 list are listed? I don't mean it's not a trick question. If I
5 am wrong just tell me.

6 A. That I did memorize it but I believe that's right.

7 Q. Okay. And I assume like anyone, when you listed the safety
8 concerns you listed the one that was most important first?

9 A. No.

10 Q. You didn't?

11 A. No. I see we have carbon monoxide first and carbon
12 monoxide is a valid concern but handling the materials is our
13 primary concern. And --

14 Q. So it's just accidental that the first thing you listed was
15 that the carbon dioxide concern?

16 MR. FASMAN: Your Honor, can the witness finish was
17 his answer before Mr. Kennedy --

18 MR. KENNEDY: I thought he had.

19 THE COURT: I think had he finished. Had you finished
20 your answer before?

21 A. No. The material handling is our primary concern, along
22 with the poorly shielded machines that are customarily used.

23 Q. All right. I noticed that in the report you dated you
24 prepared dated March 13, 2012 for purposes of using in this
25 litigation doesn't include any reference to the carbon dioxide

1 concern, correct?

2 THE COURT: Carbon "monoxide".

3 MR. KENNEDY: Sorry. Yes.

4 A. Yes, there's carbon monoxide listed in Paragraph Eight.

5 Q. No. I am referring to the report that's attached as
6 Exhibit B. I apologize if I misdirected you. The exhibit to
7 your report.

8 A. Oh, I am sorry. No. I believe this is focused on material
9 handling.

10 Q. And the carbon monoxide concern arises because it's a gas
11 powered engine for the bending machine; is that correct?

12 A. That's correct.

13 Q. And the industry's been using gas powered engines, would
14 you say, for 50 years?

15 A. I assume so, yes.

16 Q. Okay. So the material handling steps, if we could just
17 examine those for a second. When you refer to material
18 handling steps, isn't it true that the same analysis about the
19 times that rebar has to be handled at a site is true for every
20 site in the City of New York, not just for the VFC site?

21 A. No.

22 Q. What is special about the VFC site for purposes of material
23 handling analysis?

24 A. Most sites have much cleaner resistant paths -- would have
25 set back on a roof with bending an RD pick with a crane to that

C3GAANAVO

Smith - Cross

1 location and pick from that to the floor where you are working.

2 There is no such clear paths.

3 Q. All right. In fact, I believe you indicated that the rebar
4 has to be lowered through certain openings, I guess, into the
5 belly of the development, correct?

6 A. That's right.

7 Q. Isn't that true whether the rebar is bent on-site or
8 brought in bent. It still has to be lowered through those
9 openings that you identified?

10 A. It does.

11 Q. So that the existence of these opening through which rebar
12 has to be lowered really has nothing to do with whether rebar
13 is bent on-site or off-site, does it?

14 A. No. What I am saying, what the report says is that there
15 will be multiple steps where the bar will be brought in
16 straight, brought to a bending facility including all the steps
17 to get it there and then distributed from the bending facility
18 to the installation area. If it were bent off-site it would be
19 just dropped from the truck into the building, delivered to the
20 installation area. So a whole generation of moves is
21 eliminated.

22 Q. You've analyzed the, I should say, compared the bending
23 steps that are necessary for on-site bending versus off-site
24 bending in your March 13th report, correct, sir?

25 A. Yes.

C3GAANAVO

Smith - Cross

1 Q. And is it fair to say that the machine that has been
2 installed in Sayreville is a new type of bending machine?

3 A. It is.

4 Q. And it's what's called a double-ended bender?

5 A. That's right.

6 Q. And it is able to simultaneously bend both ends of the bar
7 at once?

8 A. That's right.

9 Q. And the on-site machines can only bend one end of the bar
10 at once, correct?

11 A. That's correct.

12 Q. So that a bar done on-site has to be bent twice, whereas, a
13 bar at Sayreville can be bent only once?

14 A. Correct.

15 Q. Now, am I right that it is more efficient economically to
16 do the bending at Sayreville where you only have to bend each
17 bar once?

18 A. Yes.

19 Q. And would it represent monetary savings to Navillus if they
20 were to do all of their bending through the double-ended
21 bending machine?

22 A. There are pluses and minuses but it would probably, yes.

23 Q. In fact, can I speculate that you've done an analysis of
24 how much money that Navillus would save if it could perform all
25 of the bending at the Sayreville site even using three men doing

C3GAANAVO

Smith - Cross

1 the double bending?

2 A. No.

3 Q. Would it be millions of dollars?

4 A. I don't know.

5 Q. Could it be million of dollars?

6 A. I don't believe so.

7 Q. How much do you think it would be?

8 MR. FASMAN: Objection. He said he didn't know, your
9 Honor.

10 THE COURT: Objection sustained.

11 MR. KENNEDY: Okay.

12 BY MR. KENNEDY:

13 Q. Have you compared the man hours it takes to bend one ton of
14 rebar on-site versus the off-site double ended benders?

15 A. I have not.

16 Q. Did the prospect of Navillus saving money by using a more
17 efficient bending machine enter into your determination that
18 the Sayreville facility should used to cut and bend this rebar?

19 A. Our primary focus was the safety and the schedule.

20 Q. Well, I understand that you asserted that's your primary
21 focus. Was there a secondary focus that recognized an economic
22 savings involved?

23 A. Yes.

24 MR. KENNEDY: No further questions.

25 THE COURT: Okay. Thank you. Any brief redirect?

1 REDIRECT EXAMINATION

2 BY MR. FASMAN:

3 Q. Mr. Smith, let me direct your attention to Paragraph 18 of
4 your affidavit please. Do you see that there?

5 A. I do.

6 Q. The last sentence, can you tell us in your own words what
7 that sentence means, the one that begins "our schedule of
8 production has already been impacted", can you explain that for
9 the record, please?

10 A. We have, particularly, areas where we have to install steel
11 so that we can get our concrete poured. These are critical
12 areas to the job. It is definitely going to delay the schedule
13 with all of the attendant costs.

14 Q. You mentioned in response to Mr. Kennedy's questions that
15 there were pluses and minuses of doing this at Sayreville.
16 What at minuses?

17 A. We have to rent a facility. So we have to buy machines.
18 We have to double trucking, the trucks have to drop there and
19 then particular up and truck into the city, those sort of
20 things.

21 Q. Okay. When you notified the union in February how did you
22 do that?

23 A. By letter. E-mail.

24 Q. Was there ever an offer made to the union to look at the
25 facility and to discuss the safety concerns with it?

C3GAANAVO

Smith - Redirect

1 A. Yes.

2 Q. Who made that offer?

3 A. I did.

4 Q. To whom?

5 A. To Mr. Terrence Moore.

6 Q. Who is Mr. Moore?

7 A. The business manager. It was also made to Mr. Kevin Kelly.

8 Q. Did the union, in fact, join you in a tour of the facility?

9 A. No.

10 Q. Did they explain why? Did they tell you why they didn't?

11 A. I believe they -- the statement was they weren't
12 interested.

13 MR. FASMAN: All right. Thank you, your Honor. I
14 have nothing further.

15 THE COURT: Thank you. Any extremely brief recross?

16 MR. KENNEDY: No, your Honor.

17 THE COURT: Okay. Thank you very much. Mr. Smith,
18 you may have a seat.

19 (Pause)

20 THE COURT: Okay. Thank you very much. Any other
21 witnesses?

22 MR. FASMAN: We have none, your Honor.

23 THE COURT: OK. Any witnesses by the defense?

24 MR. KENNEDY: Could I just have a minute to consult
25 with my client, your Honor?

1 THE COURT: Sure.

2 (Pause).

3 MR. KENNEDY: Your Honor, Mr. Kelly's declaration is
4 also part of the record and we have nothing further to add to
5 it.

6 THE COURT: All right. I have Mr. Kelly's affidavit.
7 Do plaintiffs have any other witnesses? Do plaintiffs?

8 MR. FASMAN: We don't need to cross-examine Mr. Kelly,
9 your Honor.

10 THE COURT: All right. Thank you very much, counsel.

11 I find that plaintiff has not met its burden of
12 establishing irreparable harm in this case. I do think that
13 there is, obviously, some harm. I don't think the harm is
14 irreparable. In light of the circumstances, in light of the
15 testimony by Mr. Smith, in light of arguments by counsel, but
16 let's move things along quickly. Let's schedule another
17 hearing.

18 It appears -- again, the parties should and I think
19 the parties will seek out arbitration immediately. In terms of
20 preliminary injunction hearing, I assume that there is not any
21 discovery that the parties need before having a preliminary
22 injunction hearing.

23 MR. FASMAN: We don't need any, your Honor.

24 THE COURT: What about defendant.

25 MR. KENNEDY: Well, your Honor, we would need -- and

1 we would need this in the arbitration before any preliminary
2 injunction hearing the contracts that form the basis of this
3 project, meaning the Navillus contract with the PMJ or the Port
4 Authority rather and the PMC contract with Navillus and the
5 purchase orders for the machines. Assume all that can be put
6 together pretty quickly.

7 THE COURT: Okay I understand why you might need that
8 for the arbitration. What is your need for that in terms of
9 the preliminary injunction hearing?

10 MR. KENNEDY: I am not sure I do need it to be honest
11 but I think the record would be better served to have them and
12 I am assuming that's something that could be gotten by the end
13 of the day as an example. I'm not suggesting we go through a
14 long discovery process.

15 THE COURT: What is plaintiff's position on that?

16 MR. FASMAN: Your Honor, we will happy to discuss that
17 with the arbitrator when we select one but I don't think it's
18 necessary for the PI hearing.

19 THE COURT: Okay. All right. Let's schedule a
20 hearing. Are counsel available on April 4th?

21 MR. KENNEDY: I am available, judge.

22 THE COURT: Counsel for plaintiff?

23 MR. FASMAN: Yes, I'm available, your Honor.

24 THE COURT: Okay. So let's say two o'clock on April
25 4th.

C3GAANAVO

Smith - Redirect

1 Thank you. Anything else from plaintiff today?

2 MR. FASMAN: No, your Honor.

3 THE COURT: Okay Anything else from defendant today?

4 MR. KENNEDY: No, your Honor.

5 THE COURT: Okay. Thank you very much.

6 (Adjourned)

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